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## The “Fight for 15”: Can the Organizing Model that Helped Pass Seattle’s \$15 Minimum Wage Legislation Fill the Gap Left by the Decline in Unions?

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# The “Fight for 15”: Can the Organizing Model that Helped Pass Seattle’s \$15 Minimum Wage Legislation Fill the Gap Left by the Decline in Unions?

Mary Hannah\*

## INTRODUCTION

In 2009, Arisleyda Tapia, mother to then five-year-old Ashley, lived in New York City and worked thirty hours a week at McDonald’s.<sup>1</sup> Tapia was one of the first fast-food employees to join the “Fight for 15” to protest the poverty wages and advocate for unionization.<sup>2</sup> As a result, she was fired, then re-hired by “cooler management heads,” and then had her hours cut from forty per week to thirty.<sup>3</sup> After working at McDonald’s for eight years, Tapia makes \$8.35 per hour, survives on government subsidies, and only joined the “Fight for 15” after her manager forced her to come to work with a fever.<sup>4</sup>

Tapia is representative of many fast-food employees unable to unionize and who struggle to survive off minimum wage. In 2014, SeaTac, Washington, a suburb of Seattle, became the first municipality to raise the minimum wage from the federal minimum of \$7.25 an hour<sup>5</sup> to \$15.00 an hour and was followed by the City of

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1. William Finnegan, *Dignity: Fast-Food Workers and a New Form of Labor Activism*, NEW YORKER (Sept. 15, 2014), <http://www.newyorker.com/magazine/2014/09/15/dignity-4>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Minimum Wage*, U.S. DEP’T OF LABOR, <https://www.dol.gov/whd/minimumwage.htm> (last visited Mar. 3, 2016).

Seattle's own minimum wage raise.<sup>6</sup> While Washington state's minimum wage in 2014 was \$9.32,<sup>7</sup> already higher than the federal minimum, the increase could be especially beneficial to fast-food workers. Nation-wide nearly 47 percent of workers earning minimum wage are in the food service industry, including fast food.<sup>8</sup> Frustrated by low wages and angered by the disparity between executives' high pay and their own minimum wage,<sup>9</sup> on November 29, 2012, over two hundred fast-food workers, including Tapia, walked off the job and demanded fair pay and the right to unionize without retaliation.<sup>10</sup> Fast-food workers credit this initial protest, and the subsequent two years of protests and organizing, for making Seattle's \$15 per hour minimum wage possible.<sup>11</sup>

Campaigns for higher wages within a single industry typically involve union strikes or direct negotiations with the employer rather than a national walkout. However, the fast-food industry has historically been unable to unionize and employs predominately low-income workers for minimum wage, low-skill service jobs, who survive as the working poor.<sup>12</sup> Because of the difficulties unionizing

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6. David Rolf, *Thinking Bigger in Local Minimum Wage Campaigns: The Fight for \$15 in Seattle*, ASPEN J. IDEAS (July-Aug. 2014), <http://aspen.us/journal/editions/julyaugust-2014/thinking-bigger-local-minimum-wage-campaigns-fight-15-seattle>. The \$15 minimum wage was initially put on the ballot as leverage in the fight to unionize Alaska Airlines employees. Ben Bergman, *The Accidental Origin of the \$15 Minimum-wage Movement*, MARKETPLACE (Jan. 30, 2015), <http://www.marketplace.org/2015/01/30/economy/accidental-origin-15-minimum-wage-movement>.

7. *History of Washington Minimum Wage*, WASH. STATE DEP'T OF LABOR & INDUS., <http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp> (last visited Mar. 3, 2016).

8. Drew DeSilver, *Who Makes Minimum Wage*, PEW RESEARCH CTR. (Sept. 8, 2014), <http://www.pewresearch.org/fact-tank/2014/09/08/who-makes-minimum-wage/>.

9. Steven Greenhouse, *Fighting Back Against Wretched Wages*, N.Y. TIMES (July 27, 2013), <http://www.nytimes.com/2013/07/28/sunday-review/fighting-back-against-wretched-wages.html>.

10. See Finnegan, *supra* note 1. While the National Labor Relations Board prohibits employer retaliation for unionization and organizing activities, it continues to occur. 29 U.S.C. § 158 (2006). KATE BRONFENBRENNER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 12 (2009), available at <http://www.epi.org/files/page/-/pdf/bp235.pdf> (finding 34% of Employers discharge workers for union activity).

11. See Finnegan, *supra* note 1.

12. *Id.* See also, Matt Tripp, *Why Aren't Fast-Food Workers Unionized?*, EATER (Apr. 23, 2015), <http://www.eater.com/2015/4/23/8463405/fast-food-workers-union-mcdonalds-fight-for-15>; Sarah Jaffe, *McJobs Should Pay, Too: Inside Fast-Food Workers' Historic Protest For Living*

and the decline of unions across the country, fast-food workers and unions are searching for new methods of organization and advocacy to fill the gap left by the decrease in union membership in the United States.<sup>13</sup> This Note will examine whether the organizational methods successfully employed by the “Fight for 15” fast-food worker movement in Seattle is the answer to protecting fast-food workers.

The structure of fast-food employment makes organizing a union under the National Labor Relations Act (NLRA) extraordinarily difficult due to high turnover of employees, the low-skilled nature of the job, and the franchise model.<sup>14</sup> Accordingly, a new model of organization, one that works “outside” of the NLRA, is needed to advocate for workers.<sup>15</sup> While worker organization to push broad legislative changes, such as a \$15 minimum wage, is a critical piece, it is not the sole solution to protecting workers’ rights and needs, as legislative change is heavily dependent on the political culture of communities and often slow to happen. This Note proposes that to more effectively protect the rights of fast-food workers, workers should expand the use of worker centers and explore the role of workers’ councils. Limited by the NLRA restrictions on unions and employers, utilizing these two methods of organization and

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*Wages*, THE ATLANTIC (Nov. 29, 2012) (“[M]any [fast-food jobs] are low-skill service jobs in an efficient assembly where workers are easily replaced and don’t require much education.”).

13. Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 395 (2005–2006).

14. Josh Sanburn, *Fast Food Strikes: Unable to Unionize, Workers Borrow Tactics From ‘Occupy,’* TIME (July 30, 2013), <http://business.time.com/2013/07/30/fast-food-strikes-unable-to-unionize-workers-borrow-tactics-from-occupy/>. See also Tripp, *supra* note 12. Because of the high rate of turnover, the large number of teenagers in their workforce, and the difficulty, due to the franchise model, of organizing workers in multiple work places with multiple employers, fast-food employees have struggled to meet the requirements under the NLRA to establish a union. Sévrine Knuchel, *Examining Workers’ Rights in International Human Rights Law: The Fast-Food Workers’ Movement in the United States*, 33 HOFSTRA LAB. & EMP. L.J. 1, 10 (2015). See also Josh Eidelson, *The SEIU’s Odd Recipe for Unionizing Fast Food*, BLOOMBERG BUSINESSWEEK (July 2, 2015), <http://www.bloomberg.com/news/articles/2015-07-02/for-fast-food-labor-unions-seiu-has-odd-recipe>.

15. The NLRA, 29 U.S.C. §§ 151–169 (2006), is the basic legal instrument or statute that “defin[es] the legal rights of organized groups of workers and workers in the process of organizing.” See Julie Yates Rivchin, *Building Power Among Low-Wage Immigrant Workers: Some Legal Considerations for Organizing Structures and Strategies*, 28 N.Y.U. REV. L. & SOC. CHANGE 397, 405 (2004).

collaboration, along with continued legislative pressure, provides better protection and methods for achieving worker goals.

Part I of this Note examines the history of fast food, its employees, and the history of the NLRA and unionization. Part II analyzes the barriers to unionization for fast-food workers and breaks down the “Fight for 15” in Seattle. Part III proposes utilizing worker centers and exploring workers’ councils as alternative methods for meeting worker needs while continuing to push for legislative change through the “Fight for 15” protests.

## I. HISTORY

### A. *Fast Food*

In 1948, the McDonald brothers, Mac and Richard, revolutionized the hamburger service industry and eliminated the need for well-trained short-order cooks at their hamburger stand in San Bernardino, California<sup>16</sup> Later, fast-food restaurants began to gain popularity in 1954 when Ray Kroc purchased the franchise rights to the McDonalds’ restaurant and opened new locations.<sup>17</sup>

The McDonald brothers modeled their new method, the Speedee Service System, from assembly line techniques that concentrated on a factory’s speed and volume of its flow of goods—in this case, hamburgers.<sup>18</sup> A single worker was trained on one task in the assembly process of making a hamburger. Eliminating skilled cooks dramatically cut training costs and allowed McDonald’s to hire low-skilled workers, train them quickly, and produce more hamburgers at a lower cost than competitors.<sup>19</sup> This shift in technology also allowed adolescents and other low-skilled workers to be hired in large numbers.<sup>20</sup>

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16. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 19–20 (Houghton Mifflin 2001).

17. Malcolm Gladwell, *The Trouble with Fries*, *NEW YORKER* (Mar. 5, 2001), <http://www.newyorker.com/magazine/2001/03/05/the-trouble-with-fries>.

18. *Id.* at 20, 68.

19. *Id.* at 19–20.

20. *Id.* at 68. As the training is minimal, even managers are sometimes in their late teens.  
*Id.*

After applying the assembly line to cooking, McDonald’s “routinized” cooking by creating a detailed production system manual with precise instructions on how to prepare every item of food.<sup>21</sup> This “routinization” of fast food gives McDonald’s substantial control over the workers.<sup>22</sup> By creating standardized products, processes, and machines, the corporation “impose[s] its own rules about pace, output, quality, and technique,” giving the restaurant extensive control over production.<sup>23</sup> In essence, employees’ “power” gained from specialized knowledge about the work has shifted to corporate management, as machines and directions supply most of the “skills.” Accordingly, the increased expendability of workers expands the employer’s power to dictate “wages, hours, and working conditions.”<sup>24</sup>

To maximize profits and increase employer flexibility, fast-food restaurants seek out unskilled employees willing to accept low pay for part-time hours rather than a stable, well-trained workforce.<sup>25</sup> Historically, teenagers were ideal candidates because of their low cost of living and ability to work for low wages.<sup>26</sup>

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21. *Id.* at 69. There are also pictorial instructions on the ovens and machines themselves. Currently, the McDonald’s 750-page operation manual, colloquially known as “The Bible,” details everything from cooking to restaurant layout and appearance to how employees should greet customers. *Id.* at 69–70.

22. ROBIN LEIDNER, *FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE 2* (Berkeley: University of California Press 1993); *See also* NEWMAN, *infra* note 29. Newman concludes the work has been so “dumbed down” that there is little independent judgment left in the job. NEWMAN, *infra* note 29, at 140; *See also* BARBARA GARSON, *THE ELECTRONIC SWEATSHOP: HOW COMPUTERS ARE TRANSFORMING THE OFFICE OF THE FUTURE 37* (Penguin Books 1989); *But see* NEWMAN, *infra* note 29, at 141 (highlighting Newman’s graduate student, Eric Clemons’, report on the complexities of dealing with no-shows, botched orders, and the lightening pace of working in a fast-food establishment).

23. *See* LEIDNER, *supra* note 22, at 3. In discussing the “de-skilling” of the fast-food industry and the routinization behind its success, Robin Leidner observes, “[w]hen management determines exactly how every task is to be done, it loses much of its dependence on the cooperation and good faith of workers and can impose its own rules about pace, output, quality, and technique.” *Id.*

24. *See id.* However, this statement is simplistic and an inadequate explanation of the complete dynamics between management and workers with regards to interactive service work, or work that involves face-to-face interaction with customers. *Id.*

25. *See* SCHLOSSER, *supra* note 16, at 68. Schlosser explains that teenagers “have been the perfect candidates for these jobs, not only because they are less expensive to hire than adults, but also because their youthful inexperience makes them easier to control.” *Id.*

26. *Id.* at 70. Teenagers also benefit by padding their resume with a fast food “starter job” as few employers would hire young employees with limited to no skills. *Id.* While teenagers

However, as the teenage baby boom generation grew up, the work force shrank while the industry expanded.<sup>27</sup> Fast-food restaurants turned to a new labor market of marginalized workers: immigrants, the elderly, and the handicapped—segments of the population often willing to work for low wages.<sup>28</sup>

The struggles of impoverished fast-food workers are well documented. Tyree Johnson, forty-four-year-old Chicagoan, has worked at two different McDonald's restaurants for twenty years, makes the Illinois minimum wage, and bathes in the restaurant bathroom between shifts.<sup>29</sup> Unlike the historical teenage workforce, 80 percent of fast-food employees today are over the age of twenty.<sup>30</sup> Additionally, more than half of fast-food workers' families receive some kind of government assistance.<sup>31</sup>

In 2013, there were 3.6 million fast-food employees working in the United States.<sup>32</sup> Approximately 90 percent of fast-food workers

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still work in fast-food, there is an increasing number of older adults working in fast food and staying longer. See McGregor, *infra* note 30.

27. See SCHLOSSER, *supra* note 16, at 70; See also *McDonald's: The Rise and Stall*, BLOOMBERG BUSINESSWEEK (Mar. 2, 2003, 11:00 PM), <http://www.businessweek.com/stories/2003-03-02/online-extra-mcdonalds-the-rise-and-stall>. McDonald's went public in 1965, and by 1970, a McDonald's restaurant existed in every state in the United States. *Id.*

28. See SCHLOSSER, *supra* note 16, at 70.

29. Leslie Patton, *McDonald's \$8.25 Man and \$8.75 Million CEO Shows Pay Gap*, BLOOMBERG BUSINESSWEEK (Dec. 11, 2012, 11:00 PM), <http://www.bloomberg.com/news/articles/2012-12-12/mcdonald-s-8-25-man-and-8-75-million-ceo-shows-pay-gap>. For further reading, see KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (Random House Books 1999) (following several fast-food workers living in New York City and struggling to survive on minimum wage).

30. Jena McGregor, *Fast Food Workers Are Staying Longer on the Job and Wanting More*, WASH. POST (Aug. 29, 2013), <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/08/29/fast-food-workers-are-staying-longer-on-the-job-and-wanting-more/>. See also NEWMAN, *supra* note 29.

31. SYLVIA ALLEGRETTO ET AL., UC BERKELEY CTR. FOR LABOR RESEARCH & EDUC., *FAST FOOD POVERTY WAGES: THE PUBLIC COST OF LOW WAGE JOBS IN THE FAST-FOOD INDUSTRY 1* (Oct. 15, 2013), available at [http://laborcenter.berkeley.edu/pdf/2013/fast\\_food\\_poverty\\_wages.pdf](http://laborcenter.berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf). "52 percent of the families of front-line fast-food workers are enrolled in one or more public programs, compared to 25 percent of the workforce as a whole." *Id.* The cost of providing public assistance for fast-food workers' families is approximately \$7 billion per year. *Id.*

32. *Number of Employees in the United States Fast Food Restaurant Industry from 2004 to 2018*, STATISTA, <http://www.statista.com/statistics/196630/number-of-employees-in-us-fast-food-restaurants-since-2002/> (last visited Mar. 23, 2016). In 2013, there were 3,653,168 fast-food workers in the United States, expected to rise to 3.7 million in 2018. *Id.* IBIS, a market research organization analyzing a variety of industries, defines the fast-food industry as

are paid an hourly wage, provided no benefits, and scheduled to work only as needed or unexpectedly kept longer or sent home early.<sup>33</sup> The typical fast-food employee “works thirty hours per week, compared to forty for the workforce as a whole,”<sup>34</sup> and their schedules constantly change with short notice.<sup>35</sup> In 2015, the average annual wage of a fast-food worker was \$19,820 (\$9.53 per hour), compared to the average national annual wage of \$ 48,320.<sup>36</sup> Despite the spike in profits and number of restaurants, fast-food workers are making 27 percent less than they used to in the late 1960s.<sup>37</sup> In contrast, the McDonald’s CEO made \$8.75 million in 2011.<sup>38</sup>

Fast-food workers are part of the 28 million workers who make up the bottom 20 percent of American workers by income.<sup>39</sup> Since 2009,

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“restaurants where patrons pay before eating. Purchases may be consumed on-site, taken out or delivered.” *Id.* In 2013, YUM! Brands Inc., which owns Kentucky Fried Chicken, Pizza Hut, and Taco Bell, had approximately 539,000 employees, with about 86 percent of employees working part-time. *Id.*

33. See SCHLOSSER, *supra* note 16, at 73–74. How busy or slow the restaurant is dictates whether management sends home or calls in extra, non-scheduled workers. *Id.*

34. See ALLEGRETTO ET AL., *supra* note 31, at 8. A typical McDonald’s restaurant employs around fifty employees with each employee working about thirty hours per week. See SCHLOSSER, *supra* note 16, at 74. “The large majority of fast-food employees work part time,” which avoids triggering the overtime pay requirement of the Fair Labor Standards Act (FLSA). Robin Leidner, *Fast-Food Work in the United States*, in *LABOUR RELATIONS IN THE GLOBAL FAST-FOOD INDUSTRY* 14 (Tony Royle & Brian Towers eds., 2002). FLSA mandates overtime pay for each hour worked over forty hours per week. 29 U.S.C. § 201 (2015). The Fair Labor Standards Act does not mandate a set number of hours or consistent hours. *Id.*

35. Jodi Kantor, *Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents with Hours of Chaos*, N.Y. TIMES (Aug. 13, 2014), [http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html?\\_r=0](http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html?_r=0).

36. *May 2015 National Occupational Employment and Wage Estimates, United States* U.S. BUREAU LAB. STATS., [http://www.bls.gov/oes/current/oes\\_nat.htm#35-0000](http://www.bls.gov/oes/current/oes_nat.htm#35-0000) (last modified Mar. 30, 2016) (occupation: Fast Food and Counter Workers, occupation code 35-3020). The average revenue brought in per employee was \$47,060. STATISTA, *supra* note 32. See also *Occupational Outlook Handbook: Food and Beverage Serving Related Workers*, U.S. BUREAU LAB. STATS., <http://www.bls.gov/ooh/food-preparation-and-serving/food-and-beverage-serving-and-related-workers.htm> (last visited Mar. 2, 2016). The fast-food industry pays the minimum wage to a higher proportion of its employees than any other American industry. SCHLOSSER, *supra* note 16, at 73.

37. SCHLOSSER, *supra* note 16, at 73. The actual value and spending potential of the U.S. dollar has decreased while the minimum wage did not rise enough to maintain pace. DeSilver, *supra* note 8.

38. Patton, *supra* note 29.

39. Steven Greenhouse, *Fighting Back Against Wretched Wages*, N.Y. TIMES (July 28, 2013), <http://www.nytimes.com/2013/07/28/sunday-review/fighting-back-against-wretched-wages.html>. U.S. BUREAU LAB. STATS., *supra* note 36.



“[f]ast-food restaurants have added positions more than twice as fast as the U.S. average,”<sup>40</sup> and, as workers are staying in fast-food positions longer and trying to support themselves and possibly a family,<sup>41</sup> a population who has historically been unable to unionize<sup>42</sup> may require new avenues of worker advocacy.<sup>43</sup>

### *B. Labor Unions*

Labor unions have traditionally equalized power disparities between employers and employees to alleviate inequities in pay and facilitate bargaining over working conditions.<sup>44</sup> Congress recognized the power disparity between workers and management and enacted the NLRA,<sup>45</sup> which provides private sector employees legal protections to organize, communicate, and act collectively.<sup>46</sup> The NLRA additionally set up a single procedure by which to enforce labor rights, conduct union elections, and bring claims of unfair labor practices to court through its administrative agency, the National Labor Relations Board (NLRB).<sup>47</sup> The NLRA has been only minimally amended and functions very similarly to the way it

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40. See Patton, *supra* note 29.

41. Ben Casselman, *It's Getting Harder to Move Beyond a Minimum-Wage Job*, FIFTYEIGHT (Oct. 8, 2015), <http://fivethirtyeight.com/features/its-getting-harder-to-move-beyond-a-minimum-wage-job/#fn-3>.

42. Leidner, *supra* note 34, at 13–14.

43. See McGregor, *supra* note 30. Employee turnover in fast-food restaurants is down from 120 percent in 2009 to 90 percent in 2011. *Id.*

44. See, e.g., Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 562–53 (2014). “Unions served as a vehicle for worker voice and political influence . . .” *Id.*

45. 29 U.S.C. § 151 (2015). The NLRA’s statement of Findings and Policies notes that there is an “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . .” *Id.*

46. 29 U.S.C. §§ 151–169 (2015). The NLRA enables workers to engage in concerted action free from employer coercion, retaliation, and to bargain collectively with their employer. *Id.* See also Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 ABA J. LAB. & EMP. L. 327, 327 (2010). Freeman notes that “[t]he NLRA intended to replace the costly organizational fights that historically marred U.S. labor relations with a ‘laboratory conditions’ electoral process . . .” *Id.* It also was meant to bolster the economy, facilitate labor peace, and create more jobs. *Id.*

47. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 375 (2007) [hereinafter Sachs, *Renewal*]. The NLRA preempts all state and local rules concerning labor rights and unionization. *Id.* It governs employer and union conduct. *Id.*

functioned in the 1940s.<sup>48</sup> One important amendment however, the 1947 Taft-Hartley Act, significantly limited the NLRA’s scope of worker protections by classifying mass picketing and secondary boycotts as unfair labor practices and explicitly excluding supervisors from the Act’s protections.<sup>49</sup>

Unions played a vital role in the American labor movement and have helped reduce poverty and increase the blue-collar worker’s standard of living.<sup>50</sup> “[Unions] were largely responsible for lifting significant segments of the working poor into the middle classes.”<sup>51</sup>

However, the NLRA remains static<sup>52</sup> while the U.S. economy, technology, and employment sectors have dramatically changed.<sup>53</sup> The number of service sector jobs has increased while many manufacturing jobs have moved overseas or become obsolete through technological advances.<sup>54</sup> The “ossification”<sup>55</sup> of the NLRA through

48. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (describing the many ways the NLRA has remained the same).

49. Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA’s Future*, 13 N.Y. CITY L. REV. 107, 113 (2009). See also 29 U.S.C. §§ 151-169 (2015). Supervisors, unlike employees, have no protection from employer retaliation for engaging in union activities. *Id.*

50. THE CENTURY FOUNDATION & NELSON LICHTENSTEIN, WHAT’S NEXT FOR ORGANIZED LABOR?: THE REPORT OF THE CENTURY FOUNDATION TASK FORCE ON THE FUTURE OF UNIONS 22 (1999). “In the aggregate, union members earn about one-third higher wages than nonunion workers . . .” *Id.* at 7. About 84 percent of those in unions are covered by health insurance, tripling the probability of someone without a high school diploma receiving health insurance. *Id.*

51. See Crain & Matheny, *supra* note 44, at 563. Outside of the employer context, unions “lobbied for worker-friendly legislation and campaigned for political candidates whose platforms promised law and policy reforms that would benefit workers.” *Id.*

52. See, e.g., Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 3–4 (2005). Bills reforming the NLRA were voted down or vetoed by the President in 1977, 1992, 1994, and 1997. See Estlund, *supra* note 48, at 1540–41. The difficulty in passing labor reform is largely due to the political stalemate between organized labor unions and corporate or employer lobbyists. *Id.*

53. See, e.g., Sachs, *Renewal*, *supra* note 47, at 375 n.4 (“[S]ince the time of the Act’s passage, U.S. firms have restructured production systems and rethought human resource models. While the new business models are varied and multi-layered, the NLRA now appears mismatched to nearly all of them.”).

54. DEPT. FOR PROF’L EMPS., THE SERVICE SECTOR: PROJECTIONS AND CURRENT STATS (2011), available at <http://dpeaflcio.org/wp-content/uploads/Service-Sector-2011.pdf>; Jeffery M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1138 (2007). “A significant factor . . . has been

Congress' failure to amend it has made the law unresponsive to needs of the low-income workforce. First, it has led to an increase in unfair labor practices<sup>56</sup> by employers as the NLRA's penalties fail to deter illegal employer practices.<sup>57</sup> The remedies available to affected employees<sup>58</sup> "operate as *de facto* penalties" for the employer and "results in *de facto* penalties that are far below those required to "effectuate the policies of this Act."<sup>59</sup> As such, the "often fierce management opposition"<sup>60</sup> to employee union drives is credited with lowering union density.<sup>61</sup>

Next, the NLRA requires employers to negotiate with union representatives in "good faith" but does not require employers and

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technological advances that reduce the need for labor in production jobs and in occupations where job tasks are routinized and programmable . . . ." *Id.* See also Gordon, *supra* note 52 (describing the changing structure of the U.S. economy).

55. See Estlund, *supra* note 48, at 1530. "The core of American labor law has been essentially sealed off . . . from democratic revision . . . ." *Id.* "The basic statutory language, and many of the intermediate level principles and procedures through which the essentials of self-organization and collective bargaining are put into practice, have been nearly frozen, or ossified, for over fifty years." *Id.*

56. 29 U.S.C. § 158 (a)(1) (2012). "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . ." *Id.* Section 157 outlines the rights of employees to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157.

57. See, e.g., Freeman, *supra* note 46, at 330; John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 15 (2008) (estimating unfair labor practices reduce the probability that a union will successfully negotiate a contract by 30 percent with the majority of the impact coming from employers precluding a union from forming). See also Cora Lewis, *Here's How Walmart Threatened Striking Workers*, BUZZFEED NEWS, (Feb. 19, 2016, 1:43 PM), [http://www.buzzfeed.com/coralewis/heres-the-script-walmart-used-to-threaten-staff-who-strike?utm\\_term=.wwlprEw0J#.fo2WyRPAo](http://www.buzzfeed.com/coralewis/heres-the-script-walmart-used-to-threaten-staff-who-strike?utm_term=.wwlprEw0J#.fo2WyRPAo) (Despite workers' court ordered reinstatement after being fired for striking, "A lot of folks are still scared [of being fired for protected, striking activity]. Not everyone knows about the ruling, so they think if they strike or participate something will happen to them.").

58. 29 U.S.C. § 160(c) (2015).

59. Morris M. Kleiner & David Weil, *Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies* 7, 19 (Nat'l Bureau of Econ. Research, Working Paper No. 16626, 2010). The cost savings from continued operation as a nonunion enterprise are potentially much larger than the penalty of back pay and lost wages. *Id.* at 36.

60. See Hirsch & Hirsch, *supra* note 54, at 1138.

61. Freeman, *supra* note 46, at 330. "NLRB elections have turned into massive employer campaigns against unions, in which the supervisors excluded from the protection of the law pressure workers to reject the organizing drive." *Id.*

unions to reach a final collective bargaining agreement.<sup>62</sup> Accordingly, it’s estimated that only 48 percent of newly certified unions had a contract, or collective bargaining agreement, one year after the election establishing the union.<sup>63</sup> Similarly, NLRA restrictions on employer involvement in unions have stifled creativity and communication between employers and employees about working conditions.<sup>64</sup>

The franchise model presents particular difficulty in regards to unionizing a fast-food restaurant.<sup>65</sup> Many employees are employed by a franchise owner, not the restaurant chain itself.<sup>66</sup> Accordingly, every restaurant under a different employer requires its own union. This, coupled with the high turnover rate, makes unionizing especially difficult.<sup>67</sup> Additionally, because fast-food workers are considered employees of the franchised location, and not the fast-food corporation, “even if fast-food workers at a restaurant run by a franchisee . . . [unionized], they would not be entitled to negotiate with the fast-food corporation, but only with the owner of that individual franchise . . . .”<sup>68</sup>

After a site is unionized, the NLRA allows for “decertification” of the union if a majority of the employees vote to decertify it.<sup>69</sup> Decertification can be initiated by newly hired employees or employees no longer happy with the current union.<sup>70</sup> The only

62. 29 U.S.C. § 158(d).

63. KATE BRONFENBRENNER, ECON. POLICY INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 22 (2009).

64. “It shall be an unfair labor practice for an employer . . . (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .” 29 U.S.C. § 158. See generally Isquith, *infra* note 117; Duff, *infra* note 108.

65. Leidner, *supra* note 34, at 13–14.

66. Josh Sanburn, *Fast Food Strikes: Unable to Unionize, Workers Borrow Tactics from Occupy*, TIME (July 30, 2013), <http://business.time.com/2013/07/30/fast-food-strikes-unable-to-unionize-workers-borrow-tactics-from-occupy/>.

67. Leidner, *supra* note 34, at 14.

68. Sévrine Knuchel, *Examining Workers’ Rights in International Human Rights Law: The Fast-Food Workers’ Movement in the United States*, 33 HOFSTRA LAB. & EMP. L.J. 1, 9–10 (2015).

69. HR Compl. P 94193 (C.C.H.) (2015), 2015 WL 8767274. The union is then “decertified” and no longer represents the employees collectively as their bargaining agent. *Id.*

70. *Id.* Employers cannot fire employees for being part of the union. *The Right to Strike*, NLRB, <https://www.nlrb.gov/strikes> (last accessed Aug. 29, 2016). However, employers “may

successful unionization of a McDonald's restaurant was in Mason City, Iowa in 1971, which lasted four years until it was decertified.<sup>71</sup>

A development in the labor field is worker centers—locally focused community organizing groups that target specific groups of workers, typically low-wage and often immigrant, and aid them in organizing and advocating for better working conditions.<sup>72</sup> Worker centers are not the primary bargaining agent at a “shop” and do not represent the employees in bargaining agreements. Hence, they are not subject to the same labor and strike restrictions as unions and can help diverse groups learn how to organize.<sup>73</sup>

### *C. Seattle's Movement*

In Seattle, the \$15 per hour minimum resulted from a perfect mix of political, economic, and social factors. Politically, Seattle elected the city's first “Socialist Alternative” candidate, Kshama Sawant, in November 2013<sup>74</sup> who made the initiative a major part of her platform.<sup>75</sup> The city was also influenced by the recent passage of a \$15 per hour minimum wage in SeaTac, WA, a small town south of Seattle.<sup>76</sup> Finally, a majority of the populace supported a higher minimum wage.<sup>77</sup>

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dismiss unrepresented workers at any time and for any reason not prohibited by law.” See Knuchel, *supra* note 68, at 11.

71. See SCHLOSSER, *supra* note 16, at 76.

72. Jennifer Hill, *Can Unions Use Worker Center Strategies?: In an Age of Doing More with Less, Unions Should Consider Thinking Locally by Acting Globally*, 5 FIU L. REV. 551, 555–58, 566–67 (Spring 2010).

73. Kris Maher, *Worker Centers Offer a Backdoor Approach to Union Organizing*, WALL ST. J. (July 24, 2013, 6:53 PM), <http://www.wsj.com/articles/SB10001424127887324144304578622050818960988>.

74. Linda Brill & Liza Javier, *Sawant to Become Seattle's First Socialist City Council Member*, KING5 NEWS (Nov. 15, 2013, 5:28 PM), <http://www.king5.com/story/local/2015/01/18/13350116/>.

75. Ames O'Toole, *Meet the Marxist Behind Seattle's Wage Hike*, CNN MONEY (June 24, 2014, 10:09 AM), <http://money.cnn.com/2014/06/24/news/economy/seattle-marxist-minimum-wage/>.

76. Karen Weise, *How Seattle Agreed to a \$15 Minimum Wage Without a Fight*, BLOOMBERG BUSINESSWEEK (May 8, 2014, 5:36 PM), <http://www.businessweek.com/articles/2014-05-08/how-seattle-agreed-to-a-15-minimum-wage-without-a-fight>.

77. *Id.* In 2015, 74 percent of Seattle voters were in favor of the \$15 wage increase. Rolf, *supra* note 6. Rolf attributes voter support for the increase to the recession, which highlighted

The fast-food worker strikes were particularly influential.<sup>78</sup> The Service Employees International Union (SEIU), a labor union representing almost two million service industry workers, prepared, organized, and funded the walkouts, predominately by financing worker centers in cities where walkouts took place.<sup>79</sup> The strikes led to national protests, which turned the issue of fast-food worker pay into a national movement reflective of income inequality. These protests were successful because the workers “plac[ed] their demands in the context of larger social and economic struggles . . . [and] tapped into a wider frustration with a [*sic*] the status quo.”<sup>80</sup>

Mayor Murray leveraged political support for the initiative and appointed a twenty-four-member group, called the Income Inequality Advisory Committee (IIAC), to create an implementation plan for the minimum wage increase.<sup>81</sup> Co-chaired by David Rolf, the president of the local SEIU, and Howard Wright, a prominent Seattle businessman, the group agreed to a plan within the four-month deadline.<sup>82</sup> The committee had incentive to come up with an appropriate plan while they had the power to do so.<sup>83</sup> The plan was ultimately approved by the city council.<sup>84</sup>

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growing income inequality, and social movements, such as the Black Friday Wal-Mart worker strikes and the “Fight for 15.” *Id.*

78. *Id.* See also Finnegan, *supra* note 1.

79. See Finnegan, *supra* note 1. See also Arun Gupta, *The Story Behind America’s Fast Food Worker Uprising*, THE GUARDIAN (Nov. 11, 2013), <http://www.theguardian.com/commentisfree/2013/nov/11/fast-food-workers-strike-end-game>.

80. Benjamin Sachs, *Why are Harris v. Quinn and Fast Food the Biggest Labor Developments of 2014?*, ON LABOR (Dec. 18, 2014), <http://onlabor.org/2014/12/18/why-are-harris-v-quinn-and-fast-food-the-biggest-labor-developments-of-2014/> (focusing on Charlotte Garden’s reaction) [hereinafter Sachs, *Labor Developments*]. The SEIU continues to organize strikes across the employment sectors. See, e.g., Dylan Rubin, *Fast Food News*, ON LABOR (Dec. 4, 2014), <http://onlabor.org/category/fast-food-news/>; Laura Shin, *Fight for a \$15 Minimum Wage Spreads to New Industries, 190 Cities*, FORBES (Dec. 4, 2014, 9:56 AM), <http://www.forbes.com/sites/laurashin/2014/12/04/fight-for-a-15-minimum-wage-spreads-to-new-industries-190-cities/>.

81. See Rolf, *supra* note 6; Weise, *supra* note 76. The IIAC was comprised of local business leaders, union leaders, and community advocates. Rolf, *supra* note 6.

82. See Weise, *supra* note 76. Mayor Murray threatened an ultimatum where he would push his own agenda through the city council if the committee could not reach a consensus. *Id.* See also Rolf, *supra* note 6.

83. Weise, *supra* note 76. Weise and Rolf note the business community wanted to avoid Mayor Murray’s plan, which the Mayor threatened to push through City Council if no other agreement was reached. See *id.*

84. *Id.*

## II. ANALYSIS

### *A. Why Minimum Wage Legislation Isn't Enough*

Fast-food workers are looking for higher wages and better working conditions. However, the nature of fast-food employment does not neatly align with the protections offered by the NLRA, leaving workers unable to easily unionize.<sup>85</sup> First, 52 percent of the families of fast-food workers are enrolled in one or more public assistance programs and around one in five workers live below the poverty line.<sup>86</sup> Living near the poverty line, many workers are unwilling to risk employer retaliation and possible job loss to attempt to unionize.<sup>87</sup> Second, even if a union is certified, despite strong employer opposition, employers are not required to come to a contractual agreement with unions.<sup>88</sup> Third, the high turnover rate and franchised nature of fast-food restaurants makes organizing a union particularly difficult.<sup>89</sup> For fast-food workers, the NLRA is an ill-suited and potentially outdated document for enforcing worker rights and organizing for collective action.<sup>90</sup>

In essence, the SEIU-backed “Fight for 15” legislative campaign in Seattle, WA negotiated a city-wide pay raise for fast-food workers who are unable to unionize. However, legislative action is very

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85. Leidner, *supra* note 34, at 16. Leidner lists the franchise model, the nature of the job, and characteristics of the workers as reasons why “resentment about wages and working conditions has not led to unionization.” *Id.* See also Gordon, *supra* note 52, at 3 (“Work itself is often configured differently, with part-time, temporary, and subcontracted arrangements increasingly substituting for direct employment.”). Subcontracted arrangements speak to franchisee situations, a common arrangement in fast food, but is largely outside the scope of this Note. *Id.*

86. See ALLEGRETTO ET AL., *supra* note 31.

87. See *id.*; Josh Eidelson, *Fast Food Walkout Planned in Chicago*, SALON (Apr. 23, 2013, 9:45 PM), [http://www.salon.com/2013/04/24/fast\\_food\\_walkout\\_planned\\_in\\_chicago/](http://www.salon.com/2013/04/24/fast_food_walkout_planned_in_chicago/) (describing minimum wage workers who “had initially been hesitant about the strike because of the risk of retaliation”).

88. 29 U.S.C. § 158(d) (2006).

89. Leidner, *supra* note 34, at 16. See also McGregor, *supra* note 30 (noting that turnover in the fast-food industry still hovers around 90 percent). This means for every 100 workers a fast-food restaurant hires at the beginning of a year, they will replace 90 of them by the end of the same year. *Id.*

90. See Estlund, *supra* note 48, at 1530 (“The core of American Labor law has been essentially sealed off . . . from democratic revision.”).

dependent on the political culture of the community. While Seattle was able to pass legislation, not all cities have the same political climate necessary to support a wage increase.<sup>91</sup> It would likely be difficult, long, and costly to replicate this legislation in the United States Congress and in more conservative cities and states.<sup>92</sup> Next, legislative change is a lengthy process, the results of which may not address all employee needs. For example, the unpredictable scheduling at restaurants, through the use of electronic scheduling, leaves workers unable to plan for changes at work.<sup>93</sup> Additionally, higher wages would not address lack of paid sick leave in the restaurant industry.<sup>94</sup> Minimum wage legislation does not address employers cutting hours when the restaurant is slow, scheduling employees last minute, or scheduling employees for fewer than forty hours per week.<sup>95</sup> Likewise, \$15 per hour is less valuable if employees only work twenty hours per week.

Another drawback of relying solely on legislation is it cannot be tailored to specific work sites and mandates only minimum compliance standards. Legislation sets a “floor” that employers cannot go below, but it does not address additional, specific needs of employees. “The rights specified in the statutes are not always what employees want or need and they may prefer to trade the statutory

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91. Several states have passed laws forbidding cities and municipalities from raising the minimum wage. Sophie Quinton, *States Battle Cities Over Minimum Wage*, PEW CHARITABLE TRUSTS (July 13, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/13/states-battle-cities-over-minimum-wage>.

92. See Jana Kasperkevic, *Alabama Passes Law Banning Cities and Towns from Increasing Minimum Wage*, THE GUARDIAN (Feb. 26, 2016), <http://www.theguardian.com/us-news/2016/feb/26/alabama-passes-law-banning-minimum-wage-increase>. See also O’Toole, *supra* note 75 (noting the difficulties Congress has had passing any sort of federal minimum wage increase); Steven Greenhouse, *VW Workers in Tennessee to Vote on Union*, N.Y. TIMES, Feb. 4, 2014, at B4, available at [http://www.nytimes.com/2014/02/04/business/volkswagen-workers-in-tennessee-to-vote-on-union-membership.html?\\_r=0](http://www.nytimes.com/2014/02/04/business/volkswagen-workers-in-tennessee-to-vote-on-union-membership.html?_r=0) (noting that while the company did not oppose the union drive, many Tennessee lawmakers, including the Governor and US Senator Bob Corker, were opposed to it).

93. See Kantor, *supra* note 35.

94. See *Serving While Sick*, RESTAURANT OPPORTUNITIES CENTERS UNITED (Sept. 30, 2010), <http://rocunited.org/roc-serving-while-sick/>.

95. Kantor, *supra* note 35. The author details a parent’s struggle to earn enough money working less than forty hours a week at Starbucks and struggling to find consistent day care for her son when the automated scheduling technology changes her schedule at the last minute, sometimes less than a day in advance. *Id.* Workers’ needs to plan their schedules is in opposition to employers’ desires for flexibility and ability to respond to the market.



right for what they actually want or need.”<sup>96</sup> Additionally, legislation cannot replicate what a union provides employees: a collective identity, equal bargaining power, and voice in shaping their working conditions.<sup>97</sup> Finally, legislative dictates must always be enforced through the court system, which is often a costly process and relies on lawyers to bring employee claims rather than negotiations between employers and employees.

### III. PROPOSAL

#### *A. Expand Worker Centers and Workers' Councils*

While minimum wage legislation and forming a union are likely not the complete answers for fast-food workers,<sup>98</sup> there are other developments in labor law that could be utilized by fast-food and potentially other low-income workers affected by the decline of unions.

The first is an emphasis and expanded role for worker centers to facilitate community organizing with the support of larger, national unions. Worker centers, locally focused community organizing groups, could continue to be especially useful for fast-food workers where each store must be organized to advocate for legislation, unionization, or simply enforce existing rights. Utilizing worker centers is a departure from the typical union-organizing model, sanctioned under the NLRA, of campaigning with workers at a single

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96. William R. Corbett, *Waiting for the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 276 (2002). Professor Corbett notes we already have a statute in place, the NLRA, which could effectively create, through employee voice, work place policies tailored to the work site, reducing the need to rely on legislation for individualized work place protections. *Id.*

97. 29 U.S.C. § 157 (2006). *See also* James Sherk, *How to Give Workers a Voice Without Making Them Join a Union*, THE ATLANTIC (Mar. 11, 2014), <http://www.theatlantic.com/politics/archive/2014/03/how-to-give-workers-a-voice-without-making-them-join-a-union/284328/>. The author notes the NLRA “prohibits almost any formal employee voice on the job outside of collective bargaining with a union.” *Id.*

98. *See* Shannon Gleeson, *Going Beyond the Minimum*, U.S. NEWS & WORLD REP. (May 6, 2016), <http://www.usnews.com/opinion/articles/2016-05-06/a-higher-minimum-wage-alone-wont-solve-low-wage-workers-problems>. Gleeson argues an increased minimum wage may not actually benefit workers due to high levels of wage theft and barriers to pursuing claims in the legal system. *Id.*

job site and then representing those workers if they vote to unionize.<sup>99</sup> Instead, worker centers help fast-food employees “revitalize a practice . . . [of] collective action in support of specific workplace demands *without* first having a union in the workplace.”<sup>100</sup> Often worker centers organize workers to vindicate workplace rights through statutes other than the NLRA, such as the Fair Labor Standards Act which governs hourly wage violations.<sup>101</sup> This practice is in essence “flipping the script” on typical union organizing and has shown to be an effective practice for workers where unionization is not feasible.<sup>102</sup> Organizing outside union membership is being utilized by local worker centers, with funding from the SEIU,<sup>103</sup> and is legal for workers to organize and work collectively to advocate for better working conditions “outside of the NLRA.”<sup>104</sup>

Additionally, most worker centers offer programs to improve skills and teach organizing skills or ways “to amplify the collective voice.”<sup>105</sup> Worker centers offer a critical community organizing tool national unions should continue to utilize in greater numbers because of their emphasis on organizing immigrant and low-income populations.<sup>106</sup>

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99. See Sachs, *Renewal*, *supra* note 47, at 377–78.

100. See Sachs, *Labor Developments*, *supra* note 80.

101. Sachs, *Renewal*, *supra* note 47, at 391–93.

102. See Hill, *supra* note 72, at 566. See also Sachs, *Renewal*, *supra* note 47, at 391 (highlighting a successful 2001 campaign for unpaid overtime wages by garment factory workers and the worker center “Make the Road by Walking,” despite lack of unionization).

103. Alejandra Cancino, *Union Spent at Least \$2 Million Last Year on Fight for \$15 Movement*, CHI. TRIB. (May 29, 2014, 12:05 PM), <http://www.chicagotribune.com/business/chi-union-spending-fight-for-15-20140529-story.html>.

104. “Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157 (2015) (emphasis added). See also Nicole Hallett, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 478 (2015) (noting workers centers are not restricted like typical unions).

However, despite the illegality, employees still face the risk of illegal employer retaliation to collective action. See Maher, *supra* note 73; Freeman, *supra* note 46, at 331; and Steven Greenhouse, *McDonald’s Ruling Could Open Door for Unions*, N.Y. TIMES, July 30, 2014, at B1, available at [http://www.nytimes.com/2014/07/30/business/nlrh-holds-mcdonalds-not-just-franchisees-liaable-for-worker-treatment.html?\\_r=0](http://www.nytimes.com/2014/07/30/business/nlrh-holds-mcdonalds-not-just-franchisees-liaable-for-worker-treatment.html?_r=0).

105. See Hill, *supra* note 72, at 558. Programs include teaching workers organizing techniques, and skills training. *Id.* at 572–73.

106. English is the second language for one-sixth of workers in the U.S. restaurant industry. See SCHLOSSER, *supra* note 16, at 70. One-third of that group does not speak English. *Id.* at 70–71.

However, many are critical of worker centers for being too close with unions and allegedly circumventing the NLRA.<sup>107</sup> Some argue worker centers are simply a way for unions to organize secondary boycotts, and other organizing tools banned by the NLRA, to use against employers.<sup>108</sup> Worker centers must be careful to avoid acting as unions or functioning as the bargaining agents of workers. In sum, worker centers are a valuable option to help fast-food workers organize for whatever goals they choose to advance, whether it's legislative change, enforcing statutory rights for work place violations apart from the NLRA, or pressuring specific employers for site-specific changes.

A second development which could benefit both employers and employees is the "works council," advocated by Harvard Law Professor Benjamin Sachs. The works council is a European model of collective bargaining, used widely in Germany and other countries,<sup>109</sup> and, broadly defined, is an "institutionalized bod[y] for representative communication between a single employer and the employees of a single plant or enterprise."<sup>110</sup> A works council represents employees in communications with the employer, regardless of their union affiliation,<sup>111</sup> by facilitating communication between employer and employees. Councils give employees a direct and common voice in employer policies.<sup>112</sup> Notably, councils do not call strikes or negotiate

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107. See Maher, *supra* note 73.

108. *Id.* For additional information see *About, WORKER CENTERS*, <http://workercenters.com/about/> (last accessed Sept. 22, 2016), a website opposed to worker centers. For example, employers worry employees of different industries (such as Wal-Mart and McDonald's) may collaborate with each other to protest outside the different stores, which could trigger NLRA sanctions. See Michael C. Duff, *Alt-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 838–89 (2014).

109. See Homer, *infra* note 111.

110. JOEL ROGERS & WOLFGANG STREEK, *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 6 (Univ. of Chi. Press 1995). The broad definition includes the many different forms and functions of works councils throughout Europe. *Id.*

111. Rachel Homer, *An Explainer: What Are German-Style Works Councils?*, ON LABOR (Sept. 23, 2013), <http://onlabor.org/2013/09/23/an-explainer-what-are-german-style-works-councils/>. Councils and unions often co-exist in a workplace, either merging together into one entity to existing independently with separate roles. See ROGERS & STREEK, *supra* note 110, at 6–7.

112. ROGERS & STREEK, *supra* note 110, at 8 (“[Councils] typically aggregate the views of workers . . .”).

wage issues.<sup>113</sup> Three basic types of councils exist in Europe: (1) Paternalistic Councils, formed by the employer primarily to prevent unionization; (2) Consultative Councils, designed to enhance economic competitiveness of the firm through cooperation and communication between employees and management; and (3) Representative Councils, frequently authorized through legislation, which enable employees to assert “distributional rights,” as part of a firm’s political system.<sup>114</sup>

In Germany, works councils coexist with powerful, national unions, which help pressure employers to act on works council demands for fear of a strike.<sup>115</sup> Advocates call for works councils to be implemented in the US as a way of giving employees, who otherwise cannot unionize, a voice in employer work conditions.<sup>116</sup>

However, there is much critique surrounding works councils and impediments to implementation. Most importantly, the legal structure of the NLRA prevents “company unions,” groups without official union status that are sanctioned by the employer, from bargaining over wages and the terms and conditions of employment.<sup>117</sup> Currently, in the United States, a works council likely could only exist under the umbrella of a certified union.<sup>118</sup> Recently, The VW Volkswagen plant in Tennessee had set up a forum similar to their “worker councils” in Germany, which inspired both praise and

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113. See Homer, *supra* note 111. This is reserved for unions.

114. ROGERS & STREEK, *supra* note 110, at 10.

115. Janice R. Bellace, *The Role of the Law in Supporting Cooperative Employee Representation Systems*, 15 COMP. LAB. L.J. 441, 446 (1994). “In the United States, there are no mechanisms for worker representation which have statutory backing other than collective bargaining. Moreover, there is no widespread management practice of voluntarily engaging in bipartite discussions with independent employee groups.” *Id.* at 443 (citation omitted).

116. See Homer, *supra* note 111.

117. 29 U.S.C. § 158(a) (2012) (“It shall be an unfair labor practice for an employer (2) to dominate or interfere with the formation or administration of any labor organization . . .”). See also Elias Isquith, “Working Full-Time and Yet Still Needing Public Benefits”: Leading Expert Urges McDonald’s to Come to the Table, SALON (Oct. 31, 2014, 11:52 AM), [http://www.salon.com/2014/10/31/working\\_full\\_time\\_and\\_yet\\_still\\_needing\\_public\\_benefits\\_leading\\_expert\\_urges\\_mcdonalds\\_to\\_come\\_to\\_the\\_table/](http://www.salon.com/2014/10/31/working_full_time_and_yet_still_needing_public_benefits_leading_expert_urges_mcdonalds_to_come_to_the_table/).

118. *Id.* See also Neal E. Boudette, *Volkswagen Reverses Course on Union at Tennessee Plant*, N.Y. TIMES (Apr. 25, 2016), [http://www.nytimes.com/2016/04/26/business/volkswagen-reverses-courseon-union-at-tennessee-plant.html?\\_r=1](http://www.nytimes.com/2016/04/26/business/volkswagen-reverses-courseon-union-at-tennessee-plant.html?_r=1).

critique.<sup>119</sup> The VW plant in Chattanooga, Tennessee allowed minority unions, different groups with support but no majority vote, to bargain and meet with management.<sup>120</sup> Many applauded this decision to give employees a voice.<sup>121</sup> However, some feared it facilitates the further undoing of unions by “allowing representative bodies without collective bargaining rights [that] could create a system of ‘fake representation,’ without real worker power.”<sup>122</sup> However, the discussions at the VW plant are currently moot. After a large portion of VW’s senior management changed following revelations the company implemented software to “cheat” emissions testing, the company is now vigorously fighting against recognizing the UAW, after the Tennessee plant’s maintenance workers voted to unionize.<sup>123</sup> Regardless, works councils are an option worth exploring because fast-food workers face many struggles organizing and have little voice in discussions concerning their employment.

### CONCLUSION

While none of these methods of organizing or statutory changes can fill the gap left by unions in terms of providing employees with a voice and determining their working, and sometimes living,

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119. See, e.g., Benjamin Sachs, *Minority Unionism (Sort Of) Comes to VW Chattanooga*, ON LABOR (Nov. 12, 2014), <http://onlabor.org/2014/11/12/minority-unionism-sort-of-comes-to-vw-chattanooga/>; Benjamin Sachs, *WSJ Columnist Jenkins Gets Works-Council Law Wrong*, ON LABOR (Sept. 19, 2013), <http://onlabor.org/2013/09/19/wsj-columnist-jenkins-gets-the-law-wrong-on-vw-works-council/>; Policy Summary of *Community Organization Engagement*, VOLKSWAGEN (NOV. 12, 2014), available at <https://onlabor.files.wordpress.com/2014/11/vw-community-organizationengagement.pdf>.

120. Steven Greenhouse, *VW to Allow Labor Groups to Represent Workers at Chattanooga Plant*, N.Y. TIMES, Nov. 13, 2014, at B4, available at <http://www.nytimes.com/2014/11/13/business/vw-to-allow-labor-groups-to-represent-workers-at-chattanooga-plant.html>.

121. See Homer, *supra* note 111.

122. Lydia DePillis, *The Strange Case of the Anti-Union Union at Volkswagen’s Plant in Tennessee*, WASH. POST (Nov. 19, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/11/19/the-strange-case-of-the-anti-union-union-at-volkswagens-plant-in-tennessee/>. Additionally, many are skeptical of workers’ councils because one of the groups lobbying for support, America Council of Employees, has not released any information about its funding or donors, leading many to speculate that it is funded by anti-union advocates. Times Free Press Staff, *ACE, with 381 VW Members, Bills Itself as UAW Alternative*, TIMES FREE PRESS (May 28, 2015), <http://www.timesfreepress.com/news/business/aroundregion/story/2015/may/28/ace-381-vw-members-bills-itself-uaw-alternati/306608/>.

123. Boudette, *supra* note 118.

conditions, together they may be able to fill some of the needs left by the decline in union membership. Low wages and the inability to organize has turned the fast-food industry into a pipeline to poverty, creating a permanent underclass dependent on government assistance. However, it does not have to be this way. Unlike globalized manufacturing, “[fast-food restaurants] compete on a domestic and level playing field . . . the low-wage structure of fast-food . . . reflects a mixture of market conditions and policy choices about minimum standards for work.”<sup>124</sup> Through a combination of legislative action resulting from the “Fight for 15,” increased use of worker centers to target low-income employees in communities, and expanded inquiries into other methods of employer/employee communication channels such as works councils, the United States can make policy choices that reflect the intrinsic value of all persons, regardless of income level.

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124. See ALLEGRETTO ET AL., *supra* note 31, at 11. The researchers contrast the United States fast-food industry with American manufacturing plants that are subject to globalization and whose labor can be outsourced. *Id.* In contrast, all American fast-food restaurants share the same customer base and cannot be outsourced. This creates a positive atmosphere for change.